

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

(Filed: November 28, 2007)

DO NOT PUBLISH

MITCH ANDERSEN,)	
)	
Petitioner,)	
)	
v.)	No. 06-0650V
)	Attorneys' Fees; Attorneys' Costs;
SECRETARY OF)	Personal Expenses
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	
)	

DECISION ON ATTORNEYS' FEES, ATTORNEYS' COSTS
AND PERSONAL EXPENSES¹

Petitioner, Mitch Andersen (Mr. Andersen), seeks an award of \$16,039.93 in attorneys' fees, attorneys' costs and personal expenses as defined by General Order No. 9 for an action that he pursued under the National Vaccine Injury Compensation Program (Program).² *See* Application for Award of Attorneys' Fees and Reimbursement of Costs (Fee Petition), filed July 10, 2007, Tab A. Richard Gage, Esq. (Mr. Gage), Mr. Andersen's attorney of record, claims nearly 43 hours of work between January 2005 and July 2007. *See* Fee Petition, Tabs E & G. Jahnice Samson (Ms. Samson), Mr. Gage's legal assistant, claims slightly more than 19 hours of work between August 2006 and July 2007. *See* Fee Petition, Tab F. Kirk Morgan, Esq. (Mr. Morgan), an associate employed by Mr. Gage's former law firm, Gage & Moxley, P.C., claims 20.6 hours of work between September 2005 and November 2005. *See* Fee Petition, Tab G. Julie Hernandez (Ms. Hernandez), a law clerk, and

¹ As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" will be available to the public. *Id.*

² The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

then an associate, employed by Gage & Moxley, P.C., claims 18.2 hours between February 2005 and December 2005.³ *See* Fee Petition, Tab G.

Respondent objects. *See generally* Opposition to Petitioner's Application for Attorneys' Fees and Costs (Opposition), filed July 23, 2007. Although respondent does not contest apparently an award of attorneys' fees, attorneys' costs and personal expenses as defined by General Order No. 9 in this case, respondent charges that the hours that Mr. Gage and others spent on "file review" and related tasks, such as medical research, are "excessive." Opposition at 4. Respondent cites specific billing entries. *See id.*

Mr. Andersen labels respondent's Opposition "unreasonable," approaching "astonishing." Petitioner's Response to Respondent's Opposition to Attorneys' Fees and Costs, filed August 27, 2007, at 1. Mr. Anderson retorts that Mr. Gage expended the majority of his time "'figuring this case out' both factually and scientifically," particularly given that certain, highly-disorganized records "made analyzing this case more difficult." *Id.* at 1-2. According to Mr. Andersen, Mr. Gage's efforts "allowed" an uncomplicated, expeditious "resolution of this case." *Id.* at 2. Likewise, Mr. Andersen retorts that "[t]his was a case of first impression," presenting "very complex neurological and immunological questions that needed to be researched." *Id.* at 1.

On May 21, 2007, the special master entered an order concluding proceedings after Mr. Andersen elected to withdraw his petition under § 300aa-21(b). Thus, Mr. Andersen did not receive Program compensation. Nevertheless, the statute enacting the Program accords discretion to the special master to "award an amount of compensation to cover" Mr. Andersen's "reasonable attorneys' fees and other costs" as long as "the special master or court determines that" Mr. Andersen possessed "a reasonable basis for the claim" and that Mr. Andersen filed the petition "in good faith." § 300aa-15(e)(1); *see, e.g., Di Roma v. Secretary of HHS*, 1993 WL 496981 (Fed. Cl. Spec. Mstr. Nov. 18, 1993). As the United States Supreme Court has cautioned in cases involving other fee-shifting schemes, the special master's "discretion is not without limit." *Blanchard v. Bergeron*, 489 U.S. 87, 89 n.1 (1989). Absent "special circumstances," the special master "should ordinarily" award attorneys' fees and costs to an unsuccessful petitioner. *Id.*, citing *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968); *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

The special master has considered carefully Mr. Andersen's Fee Petition. The special master determines that Mr. Gage's hours, Ms. Samson's hours and Ms. Hernandez's hours appear appropriate. Mr. Gage's billing statement reflects that Mr. Gage engaged in tasks that are typical for any attorney. Mr. Gage consulted with Mr. Andersen and with a medical expert; conducted factual and medical investigation; drafted correspondence and pleadings; communicated with opposing counsel; and participated in proceedings before the special master. Overall, Mr. Gage's hours are not excessive. Ms. Samson's billing statement reflects that Ms. Samson engaged in tasks that are typical for any legal assistant. Ms. Samson organized exhibits; photocopied exhibits for filing and posted filings to the United States Court of Federal Claims. Overall, Ms. Samson's hours are not

³ Ms. Hernandez gained admission to the Wyoming bar in late October 2005.

excessive. Ms. Hernandez's billing statement reflects that Ms. Hernandez engaged in tasks that are typical for any law clerk. Ms. Hernandez consulted with Mr. Andersen; corresponded with Mr. Andersen and with medical providers and reviewed preliminarily Mr. Andersen's medical records. Overall, Ms. Hernandez's hours are not excessive.

However, the special master is not satisfied that Mr. Morgan's hours are appropriate. Mr. Morgan's billing statement suggests that Mr. Morgan conducted only *general* medical and legal research *before* any substantive factual development in the case. Thus, the special master questions overall Mr. Morgan's hours. The special master reasons that without a full understanding of the facts of Mr. Andersen's case, Mr. Morgan could not know which medical and legal issues required development. Moreover, Mr. Gage duplicated seemingly Mr. Morgan's "research" once Mr. Gage obtained all of Mr. Andersen's medical records approximately one year after Mr. Morgan's final billing entry. Therefore, the special master denies Mr. Morgan's hours, reducing Mr. Andersen's Fee Petition by \$3,193.00.⁴ The special master calculates that Mr. Andersen is entitled to \$12,846.93 in attorneys' fees, attorneys' costs and personal expenses as defined by General Order No. 9.⁵

In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment in Mr. Andersen's favor for \$12,846.93 in attorneys' fees, attorneys' costs and personal expenses as defined by General Order No. 9. The judgment shall reflect that Mr. Gage may collect \$12,553.59 from Mr. Andersen.⁶ Under Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing the right to seek review.

The clerk of court shall send Mr. Andersen's copy of this decision to Mr. Andersen by overnight express delivery.

John F. Edwards
Special Master

⁴ 20.6 hours x \$155.00.

⁵ \$16,039.93 - \$3,193.00.

⁶ \$12,846.93 - \$293.34 in personal expenses as defined by General Order No. 9. *See* Sworn Declaration, filed July 30, 2007.